93-942
No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

SOCIETY BANK & TRUST,

Petitioner,

vs.

In re: BELL AND BECKWITH, Debtor,
PATRICK A. McGRAW, Trustee,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") decision conflict with this Court's decisions in *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365 (1990) and *Patterson v. Shumate*, 112 S. Ct. 2242 (1992) holding that there are "no exceptions" to the strict enforcement of the anti-alienation rule in connection with Internal Revenue Service ("IRS") approved, Employee Retirement Income Security Act ("ERISA") qualified pension plans?

2. Does the Sixth Circuit decision conflict with this Court's decisions in *Guidry* and *Patterson* by preventing strict enforcement of the ERISA anti-alienation provisions if, without the pension plan trustee's knowledge, the contributions were made in violation of any of the pension plan's terms?

3. Does the Sixth Circuit decision improperly imperil IRS approved, ERISA qualified pension plans and their trustees every time a contribution is made into the pension plan?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Statement of Jurisdiction 2

Statutes Involved 2

Statement of the Case 2

Reasons for Granting the Writ 4

I. The Sixth Circuit decision conflicts with ERISA's strict anti-alienation provisions and this Court's strict enforcement thereof. 4

II. The Sixth Circuit's decision unilaterally and without the necessary legislative authority redefines a pension plan trustee's fiduciary obligations and imposes new and onerous responsibilities and liabilities upon trustees with respect to pension plans. 5

III. The Petitioner raises issues worthy of this Court's review. 7

Conclusion 8

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Guidry v. Sheet Metal Workers Nat. Pension Fund, 493 U.S. 365 (1990) ..... i, 4, 5, 6, 7

Patterson v. Shumate, 112 S. Ct. 2242 (1992) ..... i, 4, 5, 7

Statutes Cited:

11 U.S.C. § 542(c)(2) 2

28 U.S.C. § 158 ..... 2, 4

28 U.S.C. § 1254(1) 2

29 U.S.C. § 1001 *et seq.* 3

29 U.S.C. § 1056(d)(1) 2, 3

Other Authority Cited:

Pension and Benefits Week, October 4, 1993 8

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Sixth Circuit Filed September 16, 1993 ..... 1a

Contents

Page

Appendix B — Opinion and Order of the United States District Court for the Northern District of Ohio, Western Division Filed June 3, 1992 ..... 8a

Appendix C — Order of the United States Bankruptcy Court for the Northern District of Ohio, Western Division Filed May 28, 1991 ..... 15a

Appendix D — Article from Pension & Benefits Week Dated October 4, 1993 ..... 17a

No.

In The

Supreme Court of the United States

October Term, 1993

SOCIETY BANK & TRUST,

Petitioner,

vs.

In Re: BELL AND BECKWITH, Debtor,
PATRICK A. McGRAW, Trustee,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Society Bank & Trust, herewith prays for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review its decision of September 16, 1993.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Sixth Circuit Case No. 92-3676, the United States District Court

for the Northern District of Ohio, Western Division, and the United States Bankruptcy Court for the Northern District of Ohio, Western Division are reproduced in their entirety herein as Appendices A, B and C, respectively.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was rendered and filed on September 16, 1993.

This Court has jurisdiction to review, through certiorari, the decision of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 158 and § 1254(1).

STATUTES INVOLVED

The Employee Retirement Income Security Act of 1974, Section 206(d)(1), 29 U.S.C. § 1056(d)(1):

> Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

The United States Bankruptcy Code, 11 U.S.C. § 542(c)(2):

> A restriction on the transfer of a beneficial interest in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title.

STATEMENT OF THE CASE

The Respondent, Patrick A. McGraw, Bankruptcy Trustee for the liquidation of the Estate of Bell & Beckwith ("Estate"), commenced proceedings in aid of execution with respect to certain

judgment debtors, namely the former partners of Bell & Beckwith. Pertinent to this case, Respondent served said writs upon Petitioner seeking to obtain the judgment debtors' interests in all accounts held by the Petitioner bank, including those held by Petitioner as trustee under the Bell & Beckwith Profit Sharing Retirement Plan and Trust, an employee benefit trust ("Trust"). It is undisputed that the Trust is an Internal Revenue Service ("IRS") approved, Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, ("ERISA") qualified pension plan containing an appropriate anti-alienation provision as required by ERISA. 29 U.S.C. § 1056(d)(1).

Petitioner, as trustee of the Trust, objected to Respondent's efforts to garnish any interest in the Trust. The United States Bankrupcty Court for the Northern District of Ohio, Western Division ("Bankruptcy Court") sustained Petitioner's objection, suspending the Respondent's efforts to garnish funds held in the Trust. The Bankruptcy Court ruled that the assets held in the Trust were not property of the judgment debtors subject to attack by the Respondent. (App. C).

The Respondent appealed the Bankruptcy Court Order to the United States District Court for the Northern District of Ohio, Western Division ("District Court"). The District Court reversed the Bankrupcty Court decision and remanded the case to the Bankruptcy Court for further proceedings. (App. B). The District Court held that ERISA'S anti-alienation provisions do not protect funds in the plan from alienation when such funds have been improperly contributed.[1]

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1. In support of its decision, the District Court stated that this was a case of "first impression" and that because the ". . . Court can find no broad social policies which should take precedence over the desire to do equity between these particular parties, a restriction on the garnishment proposed by the Trustee *cannot* be defended". (App. B, p. 14a).

The Petitioners then appealed the District Court order to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"). Since this dispute centered solely on a legal issue which would not be resolved by any further actions by the Bankruptcy Court on remand, the District Court's order was ripe for review on appeal pursuant to 28 U.S.C. § 158. The legal issue to be resolved on appeal was whether ERISA allows any exceptions, whether equitable or not, to the strict and uniform enforcement of its anti-alienation provisions.

The Sixth Circuit upheld the District Court's order ruling that contributions made to the Trust which failed to comport with the Trust's terms do not ". . . deserve to be shielded by ERISA from the rest of the creditors of Bell & Beckwith's estate." (App. A, p. 7a). This petition follows the Sixth Circuit's decision.

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH CIRCUIT DECISION CONFLICTS WITH ERISA'S STRICT ANTI-ALIENATION PROVISIONS AND THIS COURT'S STRICT ENFORCEMENT THEREOF.

The only issue before the Sixth Circuit was whether or not to permit the creation of an exception to the otherwise strict enforcement of the ERISA anti-alienation provisions. While acknowledging this Court's prior admonishments against creating any exception to what the Sixth Circuit characterized as this Court's "bright line" anti-alienation rule, the Sixth Circuit created just such an exception. (App. A, p. 4a). As a result, the Sixth Circuit decision conflicts with this Court's rulings in both *Guidry v. Sheet Metal Workers Nat. Pension Fund,* 110 S. Ct. 680, 493 U.S. 365 (1990) and *Patterson v. Shumate,* 112 S. Ct. 2242 (1992).[2]

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2. In *Guidry,* this Court was faced with a lower court opinion similar to the (Cont'd)

As this Court recognized in *Guidry* and *Patterson*, the social policy for nationwide uniform and consistent rules to deal with the treatment and protection of pension plans requires that no exceptions to the ERISA anti-alienation rule means NO EXCEPTIONS. The Sixth Circuit's new "*void ab initio*" theory is just such an exception and should be reviewed by this Court.

II.

THE SIXTH CIRCUIT'S DECISION UNILATERALLY AND WITHOUT THE NECESSARY LEGISLATIVE AUTHORITY REDEFINES A PENSION PLAN TRUSTEE'S FIDUCIARY OBLIGATIONS AND IMPOSES NEW AND ONEROUS RESPONSIBILITIES AND LIABILITIES UPON TRUSTEES WITH RESPECT TO PENSION PLANS.

The issue presented in this case concerns a pension plan trustee's fiduciary obligations regarding disposition of pension plan assets. The Sixth Circuit decision improperly redefines these obligations. This issue has been previously dealt with by this Court in *Guidry*. There, this Court refused to consider the equities of the case and held that ERISA created a statutory bar to any attacks for the reason that this statutory bar promotes the overriding social policy of protecting pension plans even if the result of such a rule permitted an embezzler to temporarily shield assets from rightful claimants. *Guidry*, supra., at p. 687.

(Cont'd)

Sixth Circuit's. There, the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") believed that Congress could not have intended to protect individuals from their own misconduct in applying the anti-alienation provisions of ERISA. This Court reversed the Tenth Circuit and, while recognizing the ramifications of shielding pension plan assets from third party claimants, held that in order to effectuate a uniform and consistent broad national social policy there can be no exception to the anti-alienation provisions of ERISA. This Court expressly rejected the Tenth Circuit's desire to "do equity between the particular parties." *Guidry*, supra., at p. 687.

The issue is not whether a convicted felon should be able to retain allegedly improperly contributed pension plan funds. The Petitioner has not sought to preclude Respondent from having the opportunity to prove that some or all of the pension plan assets held in the Trust, once released by Petitioner pursuant to the terms of the Trust, should be paid to the Respondent. Rather, the Petitioner has simply maintained that the Respondent's actions by garnishment against Petitioner as trustee of the Trust are, by virtue of the terms of the Trust and by the provisions of ERISA, misdirected. Instead, Respondent can and should take action against Mr. Wolfram (the alleged wrongdoer, judgment debtor and pension plan beneficiary) to collect upon its judgment once the pension assets are released from the Trust. In that way, the social policy of protecting pension plan assets, which is the foundation of the *Guidry* decision, is balanced with the equity of not permitting a convicted felon to obtain possession or control over improperly contributed pension plan funds.

There is no dispute that the contributions which Respondent believes were improper are currently held in the Trust and, consequently, subject to the sole direction and protection of Petitioner as trustee. Petitioner has assumed various strict fiduciary obligations with respect to these pension plan funds, as required by the Trust provisions and applicable law including, but not limited to, ERISA'S anti-alienation provisions. Accordingly, whether the contributions to the Trust should or should not have been made is, with respect to Petitioner and its duties and obligations, irrelevant.

Even though Petitioner was not part of the contribution process, the Sixth Circuit's decision improperly creates new fiduciary obligations which have the potential for subjecting pension plan trustees to new uncertainties, additional liabilities and to massive new litigation exposure. For example, in this case, if the Respondent successfully establishes that a portion of the

contributions to the pension plan were improperly made, the Bankruptcy Court could then order that those improper contributions be returned to the Estate. That order would be directed to the Petitioner, not the plan beneficiary, and would put the Petitioner in a legal quandary because once the funds were contributed to the Trust, whether improperly contributed or not, the pension plan trustee's fiduciary obligations and ERISA'S protections automatically attached to the funds. In order to comply with the Bankruptcy Court's order to turn the pension plan assets over to the Estate, the Petitioner would have to violate its fiduciary obligations including the clear legislative prohibition against alienation which this Court upheld in *Guidry* and *Patterson*. The Petitioner, as well as all similarly situated pension plan trustees, would thus be confronted by the dilemma of having to elect to either (1) refuse to turn over the funds and face contempt charges and/or use plan assets to fully litigate the issue; or (2) turn over the funds as ordered, causing the entire plan to become disqualified by the IRS, and then litigate the resulting issue of trustee liability with the plan participants. Such a result is untenable for the reasons that it violates the terms and spirit of ERISA, jeopardizes the IRS-approval for all ERISA qualified pension plans, conflicts with the prior rulings of this Court; and, therefore, dictates that the Sixth Circuit's decision be reviewed by this Court.

III.

THE PETITIONER RAISES ISSUES WORTHY OF THIS COURT'S REVIEW.

As an institutional pension plan fiduciary and national banking corporation, Petitioner believes that the Sixth Circuit decision has wide-reaching ramifications possibly imperiling all ERISA qualified pension plans. The issues presented by such decision are of truly national significance and are worthy of this Court's review. The Sixth Circuit decision, as it stands, creates

unnecessary uncertainties in the pension field and precarious dilemmas for pension plan trustees and such uncertainties and dilemmas can only be resolved by this Court.[3]

On behalf of all pension plan trustees, Petitioner comes before this Court for guidance requesting that the Sixth Circuit's "void ab initio" exception to the strict prohibition on alienation of pension plan assets be reviewed by this Court.

CONCLUSION

Petitioner respectfully prays that the Petition be granted.

Respectfully submitted,

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3. These problems were highlighted in the last paragraphs of an article entitled *"Contributions Made in Violation of Plan Not Shielded in Bankruptcy by Patterson v. Shumate"* in the October 4, 1993 issue of *Pension and Benefits Week*, a national publication. (*See* App. D).

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED SEPTEMBER 16, 1993

No. 92-3676

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In re: BELL & BECKWITH,
Debtor.

PATRICK A. MCGRAW, Trustee,
Plaintiff-Appellee,

v.

SOCIETY BANK & TRUST,
Garnishee-Appellant.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed September 16, 1993

Before: MILBURN and NORRIS, Circuit Judges; and WISEMAN, District Judge.*

ALAN E. NORRIS, Circuit Judge. Society Bank & Trust ("Society"), the garnishee-defendant below, appeals the district court's ruling allowing plaintiff, bankruptcy trustee Patrick A. McGraw, the opportunity to prove that Bell & Beckwith's ("B&B") contributions to its profit-

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*The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

sharing retirement plan were invalid. If proved invalid, the district court concluded that the contributions could be garnished for the benefit of B&B's bankruptcy estate, despite the anti-alienation provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* Because we conclude that any contributions made in violation of the terms of the profit-sharing retirement plan were void *ab initio* and, consequently, are properly part of the bankruptcy estate, we affirm.

FACTS

B&B was a limited partnership that conducted a stock brokerage business in Toledo, Ohio. It entered bankruptcy in 1983 after it was discovered that its managing and general partner, Edward P. Wolfram, Jr., had embezzled approximately $47 million.

B&B set up the Bell and Beckwith Profit Sharing Retirement Plan and Trust ("the plan") in 1974. Society served as trustee of the plan, which was approved by the Internal Revenue Service as an ERISA qualified pension plan for treatment under the Internal Revenue Code. It contained two provisions important to this appeal. The first, required by ERISA, is an anti-alienation clause:

> 12.3 The benefits provided hereunder shall not be subject to alienation, assignment, garnishment, attachment, execution or levy of any kind, and any attempt to cause such benefits to be so subjected shall not be recognized, except to such extent as may be required by law.

The plan, Article XII, cl. 12.3.

The second provision details the profit-sharing calculation to be made by the employer to set its yearly contributions to the plan.

Appendix A

> 3.1 . . . Contributions shall be made by the Employer only out of the Employer's net income from its business, provided that if such net income of the Employer is less than the total Employer contributions provided for herein for any Plan Year, contributions on behalf of each Participant for any such year shall be reduced ratably. Net income shall be determined in accordance with generally accepted accounting practices and shall be computed before any provisions for contributions under the Plan for any such year.

The plan, Article III, cl. 3.1. Under this provision, then, contributions to the plan would be proper only if B&B had net income from which to make the contributions.

B&B made contributions to the plan on behalf of its general partners, including Wolfram, until Wolfram's fraud was disclosed. B&B's trustee in bankruptcy, McGraw, believes that he can show that the partnership had no net income for a number of years prior to 1983. It follows, he contends, that contributions were made in violation of the terms of the plan and were void *ab initio*.

During the adversarial bankruptcy proceedings below, McGraw initiated suit against the general partners of B&B. He obtained a deficiency judgment against Wolfram and several other general partners and obtained writs of execution against their individual interests in the plan.[1] Society, as trustee of the plan, objects to the writs on the ground that the anti-alienation provision of ERISA exempts the pension plan from garnishment.

In the proceedings below, the bankruptcy court concluded that ERISA shielded the partners' assets in the plan, and ruled for Society. McGraw appealed and the district court reversed, holding that the bankruptcy trustee should have an opportunity to prove either that the

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[1] McGraw currently seeks to attach only Wolfram's interest in the plan, since he has settled his claims against the other general partners.

contributions were invalid as preferences or fraudulent conveyances, or that they were invalid because they were not supported by net income. This appeal followed.

DISCUSSION

The Supreme Court appears to have drawn a bright line rule concerning the alienability of pension benefits: they may not be alienated either voluntarily or involuntarily, inside or outside of bankruptcy, or for equitable reasons. The rule is based upon the anti-alienation provision found in ERISA, which mandates that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1).

The Court confronted the issue of alienability in *Guidry v. Sheet Metal Workers Pension Fund*, 493 U.S. 365 (1990). *Guidry* dealt with a situation in which a union leader, who was also a trustee for one of the union's three pension plans, had embezzled funds from the union. While incarcerated, Guidry filed suit against the pension plans when they determined that he had forfeited any right to his pension benefits as the result of his criminal activities. The district court imposed upon those benefits a constructive trust for the benefit of the union to satisfy a judgment the union had obtained against Guidry. Although the court of appeals affirmed, the Supreme Court concluded that the constructive trust violated ERISA's prohibition on assignment or alienation of pension benefits. *Guidry*, 493 U.S. at 373-75. The Court was unwilling to approve a generalized equitable exception to the prohibition. *Id.* at 376.

In *Guidry*, the Court discussed the purposes of ERISA and the anti-alienation clause:

> Section [1056(d)(1)] reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents

> others from securing relief for the wrongs done them. . . .
>
> . . . [C]ourts should be loath to announce equitable exceptions to legislative . . . prohibitions that are unqualified by the statutory text. The creation of such exceptions . . . would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended *only* on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular circumstances would be "especially" inequitable.

Id.

The Supreme Court adhered to this reasoning when it determined in *Patterson v. Shumate*, 112 S. Ct. 2242, 2246-48 (1992), that ERISA's anti-alienation protection applies in the context of bankruptcy as well, so that a bankrupt's pension benefits were excluded from his bankruptcy estate.[2] In reiterating its refusal to engraft equitable exceptions upon ERISA's anti-alienation clause, a unanimous Court discussed the policy concerns

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[2]The Bankruptcy Code broadly defines property of the estate. *See* 11 U.S.C. § 541. Nevertheless, a statutory exclusion applies to pension benefits. Section 541(c) provides: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2). *Patterson* clarified that "applicable nonbankruptcy law" is meant to include pension benefits as well as trusts settled under state law. *Patterson*, 112 S. Ct. at 2247-48.

underlying ERISA, as well as those underlying the bankruptcy code. First, the Court noted that the treatment of pension benefits, both inside and outside of bankruptcy, should be uniform. *Id.* at 2249 (citing *Butner v. United States*, 440 U.S. 48, 55 (1978)). Second, it stressed the goal of protecting pension benefits. *Id.* at 2250. And finally, it stressed the desirability of "uniform national treatment of pension benefits." *Id.* This court, prior to *Patterson*, had stressed similar policy concerns and emphasized the need to exempt pension plans from conflicting state and local regulations. *In re Lucas*, 924 F.2d 597, 603 (6th Cir. 1991) (holding that pension benefits are not property of the estate under the bankruptcy code), *cert. denied*, 111 S. Ct. 2275 (1991).

In neither *Guidry* nor *Patterson* was the propriety of pension contributions at issue. Here, according to McGraw, the district court, rather than carving out an equitable exception to ERISA, simply said that any contributions made on behalf of Wolfram in violation of the net income requirement of the plan would be void *ab initio*. Since void, they never became a part of the plan, and so were not being alienated within the contemplation of the ERISA prohibition. McGraw therefore contends that the policy concerns of *Guidry* and *Patterson* are not implicated in the present case. We agree.

What is unique about the plan in this case is that it is a profit-sharing plan, where the terms of the plan comport with shared liability concepts of partnership law by providing that money would be available for making contributions to the plan on behalf of the partners only when the partnership could lay claim to net income. Because the plan expressly limited contributions to being made out of B&B's net income, contributions fraudulently made on behalf of partners, or induced by a partner's fraud, when there was no net income would be void *ab initio*. Since the partners had no right to expect contributions to the pension plan would be made on their behalf when the partnership had no profits, they are in no position to complain should those contributions be

returned to the partnership's estate. Unlike the situations in *Patterson* and *Guidry*, there are no public policy considerations arguing that the contributions deserve to be shielded by ERISA from the reach of the creditors of B&B's estate.

In affirming the district court's decision that trustee McGraw should have the opportunity to prove that contributions to the plan on behalf of the general partners were invalid because they were made when B&B had no actual net income to support such contributions, we take no position on what constitutes net income. It is not clear to us, for example, what bearing, if any, Wolfram's embezzlement would have on a determination of net income. In addition, since the reasoning given above is adequate to support the district court's order, we do not reach the question of whether the contributions amounted to preferential or fraudulent transfers. As a practical matter, that question is subsumed within the parameters of the net income issue.

Accordingly, the order of the district court, dated June 3, 1992, is affirmed.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION FILED JUNE 3, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:91CV7394

IN RE BELL & BECKWITH,

Debtor,

PATRICK A. MCGRAW, TRUSTEE,

Plaintiff/Appellant,

vs.

ROSCOE R. BETZ, JR., et al.,

Defendant/Appellee

SOCIETY BANK,

Garnishee.

OPINION AND ORDER

WALINSKI, J.

This cause is before the Court on the Trustee-appellant's appeal of a final order of the Bankruptcy Court. This Court has jurisdiction pursuant to 28 U.S.C. § 158(a).

Appendix B

Patrick A. McGraw is the Trustee for the liquidation of the estate of Bell & Beckwith, an Ohio limited partnership (hereinafter referred to as the Trustee). Bell & Beckwith was a stock brokerage firm now in liquidation pursuant to the Securities Investor Protection Act of 1978, as amended, 15 U.S.C. § 78aaa *et seq.* The Trustee obtained a $29 million judgment against certain defendants[1], who were the general partners in Bell & Beckwith, in the Bankruptcy Court on January 19, 1990. He then had writs of execution issued to Society Bank & Trust (Society) to garnish those defendants' interests in the Bell & Beckwith Profit Sharing Retirement Plan and Trust (the Plan).

The Plan is a "Keogh" or "HR-10" plan[2] which apparently conforms with all pertinent IRS and ERISA guidelines. Society, as administrator and trustee, is authorized to act on behalf of Bell & Beckwith with respect to all Plan matters. Pursuant to Plan terms, contributions for each participant were to be made only out of Bell & Beckwith's net income, as determined by generally accepted accounting principles. A participant's interest in such contributions became immediately, and at all times remained, fully vested and nonforfeitable. Plan participants had no control over the termination of the Plan nor did they have access to these funds prior to retirement, death, total and permanent disability or termination

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1. Edward Wolfram Jr., John E. Thompson, Robert R. Coon II., Thomas L. McGhee, J. Robert Jesionowski, George M. Todd and Donald C. Henninger. Since the writs were issued, the Trustee has settled with Messrs. Thompson, Coon, McGhee, Jesionowski, Todd and Henninger. As such, the only partner against whose account the Trustee continues to assert a claim is that of Mr. Wolfram. Mr. Wolfram was convicted in 1983 of embezzling $47 million from Bell & Beckwith and is presently incarcerated at the Nellis Federal Prison Camp in Nevada.

2. Contributions to this type of plan are based on a plan participant's earnings from self-employment.

of employment. Participants could also make voluntary contributions which could be withdrawn quarterly. However, only Mr. Todd took advantage of that provision. Finally, the Plan contains an "anti-alienation clause which provides that:

> [t]he benefits provided hereunder shall not be subject to alienation, assignment, garnishment, attachment, execution or levy of any kind, and any attempt to cure such benefits to be so subjected shall not be recognized, except to such extent as may be required by law.

Society objected to the writs of execution on the grounds that the Plan was exempt from garnishment pursuant to Ohio Rev. Code § 2329.66(A)(10)(b) and that the Sixth Circuit's holding in *In re Lucas*, 924 F.2d 597 (6th Cir. 1991), *cert. denied* __ U.S. __, 111 S. Ct. 2275, precluded such a garnishment. The Bankruptcy Court, in a terse and somewhat cryptically worded opinion, apparently agreed with the second rationale, holding that:

> [t]he Sixth Circuit having ruled that ERISA qualified pension plans are not property of the Debtor's estate, and Bell & Beckwith's Profit Sharing Plan qualifies as an ERISA [sic] under the guidelines of the Internal Revenue Service, it is [ordered that Society's objection is sustained].

The Trustee appeals that Order on five grounds, arguing that the Bankruptcy Court erred: (1) in not holding an evidentiary hearing on Society's objections to the writs; (2) in ignoring the Trustee's claims that contributions to the Plan were potentially preferential and fraudulent: (3) in applying the holding in *In re*

Lucas, supra, to the case *sub judice*; (4) in refusing to find the Plan a selfsettled trust by general partners of a limited partnership; and, (5) in refusing to distinguish the Plan as a profit-sharing plan in circumstances where there was no net income to support contributions on behalf of the general partners.

Because the Bankruptcy Court's decision contains no factual findings, this Court must review it on a *de novo* basis, independently determining the correctness of the Bankruptcy Court's procedure and legal conclusions. *In re Lucas, supra; In re Caldwell,* 851 F.2d 852, 857 (6th Cir. 1988); *In re Stalvey & Assoc., Inc.*, 750 F.2d 464, 468 (5th Cir. 1985) (citation omitted); *cf.* Bankruptcy Rule 8013. Furthermore, despite its silence, this Court finds, and both parties apparently agree, that the Bankruptcy Court must have based its decision on the Sixth Circuit's holding in *In re Lucas.*

In that case, the Sixth Circuit first found that ERISA constitutes "applicable nonbankruptcy law" as that term is defined in the Bankruptcy Code, 11 U.S.C. § 541(c)(2). *In re Lucas, supra* at 600-602. It then found that for a pension plan to qualify as an ERISA pension plan and receive favorable tax-exempt status under the Internal Revenue Code, it must provide that plan benefits may not be assigned or alienated and it must prohibit all encroachments, whether voluntary or involuntary. *Id.* at 602-03 (citations omitted). Therefore, an ERISA-qualified pension plan is not part of a debtor's bankruptcy estate and not subject to turnover to the bankruptcy trustee. *Id.* at 603. Such a conclusion: (1) harmonizes and gives full effect to the Bankruptcy Code, ERISA and the Internal Revenue Code; (2) prevents a plan from losing tax-exempt status if a bankruptcy trustee were to seek turnover of a single debtor's interest in the plan: and, (3) guarantees uniform treatment of benefits throughout the country. *Id.*

Appendix B

The Trustee argues that the Bankruptcy Court erred in applying *In re Lucas* to the case at bar because, in that case, there was no question that the contributions the employer had made to the pension plan were valid. Similarly, in *Guidry v. Sheet Metal Workers Nat'l. Pension Fund,* 493 U.S. 365, 110 S. Ct. 680 (1990), the Supreme Court held that a union could not garnish a former union official's pension fund where the former official had pleaded guilty of embezzling funds from the union, not from the pension fund itself. The Court stated that ERISA

> reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and usually are, blameless), even if that decision prevents others from securing relief for wrongs done them . . . [a] restriction on garnishment . . . can be defended *only* on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties.

Id. 110 S. Ct. at 687 (emphasis supplied).

In the case *sub judice,* the Trustee is attempting to challenge the validity of the contributions Bell & Beckwith made to the Plan on the grounds that at least a portion of those contributions constitute preferential or fraudulent transfers under the Bankruptcy Code. He argues that, because Bell & Beckwith was a limited partnership, the employer/general partners charged with making contributions to the Plan out of net income were the Plan participants themselves. Moreover, because of the fraud perpetrated by Mr. Wolfram, Bell & Beckwith had no actual net

income for many of the years preceding its placement in liquidation in 1983. Thus, any contributions made to the Plan in any year in which Bell & Beckwith had no actual net income should be considered void *ab initio.*

This is a case of first impression; despite Society's assertions to the contrary, no other cases have been found in which a trustee or a creditor were attempting to get at a debtor's pension fund by arguing that the contributions to that fund were illegal. However, some guidance can be found in *Velis v. Rardanis*, 949 F.2d 78 (3rd Cir. 1991). In *Velis*, the Third Circuit stated that:

> [w]e believe it reasonable to conclude that Congress intended to provide protection against the claims of creditors for a person's interest in pension plans, unless vulnerable to challenge as fraudulent conveyances or voidable preferences. Presumably, substantial or unusual contributions to a self-settled pension trust made within the preference period, or with intent to defraud creditors, should receive no protection.

Id. at 82.

This Court agrees with that statement. Congress cannot have intended ERISA's anti-alienation provisions to shelter assets improperly or fraudulently contributed to a pension plan. Moreover, such a conclusion in no way conflicts with the policies espoused in either *In re Lucas* or *Guidry.* It does not destroy the harmony or give less than full effect to the Bankruptcy Code, the Internal Revenue Code or ERISA. A trustee seeking to recover improper or fraudulent contributions made on behalf of a single

debtor will not destroy the tax-exempt status of an ERISA plan. Pension benefits will continue to receive uniform treatment throughout the country. Finally, because this Court can identify no broad social policies which should take precedence over the desire to do equity between these particular parties, a restriction on the garnishment proposed by the Trustee here *cannot* be defended. As such, the Trustee should have an opportunity at an evidentiary hearing to prove that the contributions Bell & Beckwith made to the Plan on behalf of the general partners were invalid because they constitute preferential or fraudulent transfers under the Bankruptcy Code or they were made even though Bell & Beckwith had no actual net income to support such a contribution.

Accordingly, it is

ORDERED that the decision of the Bankruptcy Court is REVERSED and this cause remanded for further proceedings not inconsistent with the views expressed above.

s/ Nicholas J. Walinski
NICHOLAS J. WALINSKI
SENIOR U. S. DISTRICT JUDGE

TOLEDO, OHIO
June 2, 1992

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION FILED MAY 28, 1991

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Judge Richard L. Speer

Case No. 85-0024

(Related Case: 83-0132)

In Re

Bell & Beckwith

Debtor(s)

Patrick A. McGraw, Trustee

Plaintiff(s)

vs.

Roscoe R. Betz, Jr.,

Defendant(s)

ORDER

This cause comes before the Court after Hearing on Society Bank and Trust's Objection to the Writ of Execution based upon the Claim of Exemption.

The Sixth Circuit having ruled that ERISA qualified pension plans are not property of the Debtor's estate, and Bell &

Appendix C

Beckwith's Profit Sharing Plan qualifies as an ERISA under the guidelines of the Internal Revenue Service, it is

ORDERED that Society Bank and Trust's Objection to the Writ of Execution be, and is hereby, SUSTAINED.

Dated: 5/28/91

s/ Richard L. Speer
Richard L. Speer
United States Bankruptcy Judge

APPENDIX D — ARTICLE FROM PENSION & BENEFITS WEEK DATED OCTOBER 4, 1993

The Courts

Contributions Made in Violation of
Plan Not Shielded in Bankruptcy by
Patterson v Shumate

Any contributions made in violation of the terms of a partnership's profit-sharing plan would be considered void when made and not protected by ERISA's anti-alienation provision or the Supreme Court's decision in *Paterson v Shumate*, the Sixth Circuit held. Thus the improper contributions would be excluded from the partnership's bankruptcy estate. (*Bell & Beckwith v Society Bank and Trust*, (1993, 6th Cir) 1993 US App LEXIS 23740)

Bell & Beckwith (B&B), a limited partnership that conducted stock brokerage business, entered bankruptcy after discovering that its managing and general partner, Edward Wolfram, had embezzled approximately $47 million. B&B had a qualified profit-sharing plan in which Society Bank and Trust served as trustee. The plan contained an anti-alienation provision. The plan also included a provision indicating that contributions had to be based on profits, i.e., contributions were proper only if B&B had net income from which to make the contributions.

B&B made contributions to the plan on behalf of its general partners, including Wolfram, until his fraud was disclosed. B&B's bankruptcy trustee claimed that he could show that the partnership had no net income for a number of years during which contributions were made. Thus, he contended that contributions were made in violation of the terms of the plan and were void ab initio, i.e., void from the beginning.

Appendix D

During the bankruptcy proceedings, the B&B bankruptcy trustee initiated suit against the general partners of B&B. He obtained a deficiency judgment against Wolfram (and other partners with whom he settled) and obtained a writ of execution against Wolfram's individual interest in the plan. Society, on behalf of the plan, objected to the writ on the ground that ERISA's anti-alienation provision exempted the plan from garnishment. The district court held that the B&B bankruptcy trustee should have an opportunity to prove either that the contributions were invalid as preferences, or as fraudulent conveyances, or because they were not supported by net income. Society appealed.

The anti-alienation provision found in ERISA Sec. 206(d)(1) requires plans to provide that benefits may not be assigned or alienated. The Sixth Circuit noted that the Supreme Court had confronted the issue of alienability in *Guidry v Sheet Metal Workers Pension Fund* (1990) 493 US 365 and held that a constructive trust violated ERISA's anti-alienation provision. Later, in *Patterson v. Shumate* (1992) 112 S Ct 2242, the Supreme Court held that ERISA's anti-alienation protection applies in bankruptcy cases so that a bankrupt's pension benefits are excluded from the bankruptcy estate.

The Sixth Circuit read *Guidry* and *Patterson* as drawing a "bright line rule" concerning the alienability of pension benefits: they may not be alienated either voluntarily or involuntarily, inside or outside of bankruptcy, or for equitable reasons. However, the Sixth Circuit distinguished both *Guidry* and *Patterson* saying that in neither case was the *propriety* of pension contributions at issue. Here any contributions made on behalf of Wolfram in violation of the plan's net income requirement were void from the beginning, i.e., when made. If void, the contributions never became a part of the plan, and so were not being alienated within the meaning of the ERISA prohibition. Consequently *Guidry* and *Patterson* did not

control the outcome of this case.

The Sixth Circuit emphasized that what was "unique" about the plan here was that it was a profit-sharing plan which provided that money would be available for making contributions on behalf of the partners only when the partnership could lay claim to net income. Because the plan expressly limited contributions to being made out of B&B's net income, contributions fraudulently made on behalf of partners, or induced by a partner's fraud, when there was no net income, would be void. Since the partners had no right to expect that plan contributions would be made on their behalf when the partnership had no profits, they were in "no position to complain" if the contributions had to be returned to B&B's estate, the Sixth Circuit reasoned.

Unlike the situations in *Patterson* and *Guidry*, there were no public policy consideration for using ERISA to shield the contributions from the reach of B&B's creditors, the Sixth Circuit added.

- observation: While the Sixth Circuit carefully couched its decision in terms of the profit-sharing plan being "unique," a broad reading of the court's decision would prevent *Patterson v. Shumate* from shielding contributions made to any type of plan if the contributions were made in violation of any of the plan's terms.

- observation: In Letter Ruling 8131020, IRS stated that if a qualified plan complies with a bankruptcy court's order to pay a specified portion of a bankrupt retiree's pension to a trustee in bankruptcy, the plan would be disqualified. Thus if a court orders a plan trustee in Society Bank's position to pay plan funds into bankruptcy, the plan trustee would be

confronted with the dilemma of having to choose between complying with a court order that would result in disqualification of the plan, and risking a contempt citation for not complying with the court's order (assuming all avenues of appeal have been exhausted).